The International Status of the Grand Duchy of Luxemburg and the Kingdom of Belgium in relation to the present European War

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REPRINTED FROM MICHIGAN LAW REVIEW, VOLUME XIII, NOS. 5 & 6, MARCH & APRIL, 1915

THE INTERNATIONAL STATUS OF THE GRAND DUCHY OF LUXEMBURG AND THE KINGDOM OF BELGIUM IN RELATION TO THE PRESENT EUROPEAN WAR.

"You are always talking to me of principles as if your public law were anything to me; I do not know what it means. What do you suppose that all your parchments and treaties signify to me."—*Alexander I. to Talleyrand, quoted by John Morley in Life of William E. Gladstone.*

"Just for a word, 'neutrality,' a word, which in war time had so often been disregarded—just for a scrap of paper—Great Britain was going to make war on a kindred nation."—*Dr. von Bethmann-Hollweg, German Imperial Chancellor, to Sir E. Goschen, British Ambassador at Berlin. See "White Paper" of Great Britain.*

THE International *status* of the Grand Duchy of Luxemburg and of the Kingdom of Belgium, through whose territory the army of Kaiser William II marched, in order, to use the expression of Grotius, "to meet the enemy," has been, since the outbreak of the present European war, the crucial point of discussion between the diplomatists and publicists of the belligerents, each trying to impress upon the neutral public the justice of the cause of their country.

But speaking generally, in the eyes of the neutrals, in the present world-turmoil, one of the most civilized nations of Europe stands before the forum of justice as the disturber of universal peace and the violator of the law of nations. Leaving to future historians to pass upon the first charge, let us see whether the second has any foundation justifying the criticisms of and the abuses heaped upon the ruler as well as the government of the nation accused of the flagrant misuse of its might for the furtherance of its national interests.

The German Kaiser and his ministers are accused of having trampled underfoot the fundamental rights of the weak States by violating their independence and neutrality, thus acting not only contrary to international usage, but also in direct violation of the international compacts of which their government was one of the principal contracting parties.

Limiting ourselves to these particular charges, let us first examine the violation of the conventional right in order to see whether the accusation is well founded and the accused nation deserves to be, so to say, outlawed from the membership of the family of nations.

The diplomatic instruments bearing upon the question are: first, The Treaties of Guaranty of the Neutrality of Belgium of April 19, 1839, and that of May 11, 1867, of the Grand Duchy of Luxemburg; second, The Hague Conventions of October 18, 1907, on the rights and duties of neutrals in time of war on land.

The neutral status of Belgium is inserted in three separate treaties concluded at London on April 19, 1839.

The first is signed by the representatives of Austria, France, Great Britain, Prussia, and Russia on one part, and the Netherlands (Holland) on the other, which after acknowledging the dissolution of the union of the Netherlands and Belgium, declares in article VII of the annex to this treaty that "Belgium within the limits specified in articles I, II and IV, shall form an independent and perpetually neutral State. It shall be bound to observe such neutrality towards all other States."

The second treaty is that which separates Belgium from Holland and in that also the perpetual neutrality of the former country is recognized.

The third treaty is that concluded between the same five Powers and Belgium, in which the following article appears:

"Article I * * * * they (the five Powers) declare that the articles herewith annexed, and forming the tenor of the treaty concluded this day between His Majesty the King of the Belgians and His Majesty the King of the Netherlands, Grand Duke of Luxemburg, are considered as having the same force as if they were textually inserted in the present act, and they are thus placed under the guarantee of their said Majesties (of the five Powers)."

It should be observed that Holland, although one of the contracting parties to one of the above instruments, did not guarantee the neutrality of Belgium, but merely recognized that fact; therefore, although bound to respect it, she is not under any obligation to defend it in case it is violated by others.

Now has Germany violated these treaties and if so, in what way does she justify her action?

The German government, in answering the charges of the violation of her treaty engagements, sets up two kinds of defences. On one hand, acknowledging bluntly its guilt through the mouths of its highest officials, namely, the Imperial Chancellor and the Secretary of State for Foreign Affairs, tries to justify its unlawful actions, "on the ground of supreme necessity", and "high military reasons"; on the other hand, she accuses Belgium that she connived with the enemies of Germany to attack or facilitate an attack through her territory, against the Kaiser's country.

It should be observed that no charge whatever is made against the Grand Duchy of Luxemburg, whose territory has been equally invaded, in defiance of the treaty of 1867, which guaranteed also the neutrality of that country, and of which Prussia is one of the principal contracting parties.

One of the so-called hostile acts attributed to the Belgian government, is the embargo placed just before the outbreak of the war,

on cereals, which measure seems to have affected some corn destined for Germany. This charge is so trifling that it hardly needs any refutation. Suffice it only to say that even had it been true, it could certainly not have justified an invasion of Belgium; besides, the official correspondence of Belgium shows that the prohibition of cereals was of a general character, and that as soon as it was found out that the particular corn was in transit for Germany it was immediately released.[1]

The other charge against Belgium—and the only serious one—is that the Belgian government, some time before the war, was, on one hand helping the designs of France, who, according to "reliable information,"[2] was planning to attack Germany; on the other hand, was plotting with Great Britain by acquiescing in the landing of a British army in Belgium.

In proof of this "plot" the German government made public certain so-called incriminating documents, which, unfortunately for Germany, rather weaken than strengthen her case. Thus, in the minutes of the Conference between the Chief of the General Staff of Belgium and the British Military Attaché at Brussels, a passage appears, which translated into English reads as follows: "The Military Attaché answered that he knew it (that Great Britain could not land any troops in Belgium, without the consent of the latter country), but as we (Belgians) were not able to prevent the Germans from marching right on us, England would land her troops in Belgium."

Again in the original draft of the report of the Belgian Major General to the Belgian Minister of War, concerning a conference with the British Military Attaché, it is stated that "in case Belgium should be attacked the sending of about 100,000 troops was provided for." And that "the entry of the English in Belgium would only take place after the violation of our (Belgian) neutrality by Germany."[3]

It is self-evident from these "discoveries," that if there was any "plot" it was for the purpose of defending Belgium from an attack by Germany, which was quite legitimate and within the letter and the spirit of the treaty of guarantee, and not in order to invade or facilitate an incursion to the German Fatherland.

Leaving aside the subtle arguments used by the Kaiser's Ministers and the unconvincing dialectics of their apologists, for the purpose of establishing the so-called guilt of the Belgian authorities as to

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[1] Gray Paper of Belgium, no. 79.

[2] Gray Paper of Belgium, no. 19.

[3] New York Sun of December 20, 1914, in papers published by Dr. Bernhard Dernburg, formerly German Colonial Secretary.

these charges and looking into the facts of the case as they are presented by both sides, one cannot help seeing that the government of King Albert, far from conniving with the enemies of Germany to attack the latter, did on the contrary everything in its power to prevent France and Germany from making the territory of Belgium the theatre of the war operations.

From the perusal of the official papers and other facts known already, an impartial observer cannot see anything which in the slightest degree throws a suspicion of bad faith on the part of the Belgian Ministers. If there is one thing that Belgium can be accused of both by France and Germany it is that, ever since her independence in 1831, she never showed any inclination to be incorporated into either of her powerful neighbors. On the contrary, she adhered steadfastly to her right to shape her own political destiny, regardless of the community of language or affinity of nationality with France or Germany. The people of Belgium, be they Belgian or Flemish, had one desire, and that was to live in peace within their present geographical limits, and to further the commercial, industrial and intellectual development of their country. As for the question of concerting measures for the defence of their territory, with any of the signatories of the Treaty of Guarantee of 1839, the Belgian government was more than justified in appealing to any of these Powers to assist her to repel any actual or contingent invasion of her territory. It was not only her right to do so, but also her duty. Hence the construction of fortresses and other means of defence undertaken by Belgium ever since her independence.[4] Hence the existence of a standing army. That right was never questioned by any of the Powers who guaranteed her neutrality. At the time of the conclusion of the Treaty of 1867 which guaranteed the neutrality of Luxemburg, and on the adoption of Article III of that instrument, by which the government of Luxemburg undertook not to maintain in their territory any fortified places or a military establishment, the Belgian Plenipotentiary fearing lest such stipulation might be used as an argument against his country's right of having fortified places and generally an army for the defence of Belgium, made the following declaration: "It is well understood," he said, "that Article III does not affect the right of other neutralized states to preserve, and if necessary, to improve, their fortified places and means of defence." Not only was no objection made to this declaration by any of the Plenipotentiaries of the contracting parties, but they acquiesced in it, the declaration being inserted in the 4th Protocol of the Conference.[5]

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[4] Dr. Geffcken in Holtzendorf's des Völkerrechts IV. 136.

[5] E. Servais, Le Grand Duché de Luxemburg et le Traité de Londres, 174.

While official Germany pleads guilty to the charge of the violation of the Treaty of 1839 guaranteeing the independence and neutrality of Belgium, and tries, in an afterthought, to justify her action by accusing the Belgian government of plotting with the enemies of Germany, in the hope of palliating the effect of her wrongful act on public opinion, her apologists, be they official or officious, becoming "more Royalists than the King" of Prussia (although some of them, no doubt, work, much to their credit, pour le Roi de Prusse) strain every nerve to prove either that the Treaty of 1839 was obsolescent or that the Kaiser was justified in disregarding it because the supreme necessity of the State required it. In fact while the German government does not question the validity of that instrument its apologists consider it as not being binding upon the German Empire.

One of them,[6] after making a distinction between "guaranteed" and "ordinary" neutrality, lays down the rule that a belligerent is not under any special obligation to observe the "ordinary" neutrality. In plain words that, in the absence of a treaty guaranteeing the neutrality of a state, a belligerent, may, if it thinks fit, march his army against her enemy, across the territory of a neutral state, against the consent of the latter. After laying down this premise and drawing the above conclusion, he enters into the discussion of his principal subject as to whether Germany has, in the present war, committed an illegal act by violating the guaranteed neutrality of Belgium. In the first place he questions the validity of the treaty of 1839, which guaranteed the "independence and neutrality of Belgium." The reasons given for the support of that view are the following:

First. That the Treaty of 1839 was signed by Prussia, and not by the present German Empire.

Second. That Belgium, is now, according to his opinion, a world power, with many millions of inhabitants, a large army, and extensive colonies and lastly "an active commerce mediated by its own marine, with many, if not all, parts of the world."

It should, however, be at the outset stated that the meaning of the word "perpetual" ought not to be misunderstood and by giving to it a false construction try to show its so-called absurdity. It is used in treaties recognizing or guaranteeing the permanent neutrality of States in order to distinguish it from temporary neutrality, namely from that of the states who chose to remain neutral during a war between other Powers. While non-belligerent States are not under any obligation to be neutral, the States under perpetual neutrality are bound to keep the peace, unless they are attacked, as it is now the

[6] Prof. John W. Burgess, of Columbia University, New York Times of October 28, 1914.

case of Belgium. The States guaranteeing such perpetual neutrality are undoubtedly bound to respect it, as is the case of Switzerland, and in some cases, to defend such State if attacked, as is the case of Belgium. It is, however, beyond question that notwithstanding the word perpetual, a new treaty may alter such situation, and it is not less true that as long as such treaty is in existence, it would be, to use the words of the German Imperial Chancellor, "a violation of the dictates of international law" to violate the neutrality of such a state in order to reach the enemy's country "by the quickest and easiest route," as the German Secretary of State officially declared.

Prof. Burgess, in order to prove the soundness of his view as to the obsolescence of the treaty of 1839, quotes the well known passage from Mr. Gladstone's speech on Belgian neutrality, to which we shall hereafter refer, and which has now become the shibboleth, so to say, of the defenders of the rights and wrongs of Germany.[7]

Another argument that is used by the apologists of Germany in order to prove their contention as to the non-validity of that instrument, is the fact of the conclusion of two additional treaties between Great Britain on one part and France and Prussia on the other, during the Franco-German war of 1870, for the preservation of the Belgian neutrality by the then belligerents.

As the views of most of the apologists of Germany evidently represent the opinion of intellectual Germany, it may be necessary to give some explanations, so that the public may form a correct opinion as to the legal side of the points at issue.

The first question to be examined is the validity of the treaty of 1839 guaranteeing the perpetual neutrality of the Kingdom of Belgium in regard to the German Empire.

Did the creation of the German Empire in 1871, affect in any way the validity of the treaty of 1839 of which Prussia was one of the principal contracting parties?

As a general rule, States which form a confederation or a federal union, retain their right of concluding treaties, unless it is specifically withdrawn from them by the act which creates their union. Consequently pre-existing treaties are considered as being binding upon them unless such compacts are of a character seriously compromising or nullifying the confederation or union, and in the last case their denunciation may be justified.

The Constitutional Act of 1871 establishing the German Empire did not obliterate the political entity of the States that entered the union and least of all of the Kingdom of Prussia whose sovereign

[7] Dr. Bernard Dernburg, formerly German Colonial Secretary, in North American Review, December 1914, and New York Sun of December 6, 1914. Also Dr. Edmund von Mach in New York Times of November 1, 1914.

became the Emperor of the federal union. Some of these States retained even the right of concluding certain kinds of treaties and in a limited way preserved the right of sending and receiving diplomatic agents.

The question of the validity of treaties concluded by some of the German States before the Constitutional Act of 1871 was tested in the courts of this country more than once. Thus, *In re Thomas*,[8] in which the point at issue was whether a fugitive from justice from Bavaria could be extradited by virtue of the treaty of extradition concluded between the United States and Bavaria, before the creation of the German Empire in 1871, Mr. Justice Blatchford in deciding the case, said:

"It is contended on the part of Thomas (the person whose extradition was sought by the representative of Germany) that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that the existing treaties between the several States composing the confederation, called the German Empire, and foreign countries, were annulled or to be considered as abrogated." The same question came up before the Supreme Court of the United States in 1901 in the case of *Terlinden v. Ames*[9] when the highest court of the land endorsed the opinion of Judge Blatchford. In this case also the issue was the same, namely, as to whether the treaty of extradition concluded between the United States and Prussia before the Act of 1871, was still in force, the official representative of Germany who applied for the extradition of the Prussian subject contending that it was valid, while the person whose extradition was asked claimed that it was null and void, because, as he alleged, Prussia concluded the treaty before the creation of the German Empire. Mr. Justice Fuller, handing down the decision of the court, said: "Undoubtedly treaties may be terminated by the absorption of Powers into other nationalities and the loss of separate existence as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance. On the adoption of the Constitution of the German Empire, the King of Prussia was found to be the chief executive of the North German Union endowed with power to carry into effect its international obligations, and those of his

[8] 12 Blatch 370.
[9] 184 U. S. 270.

Kingdom, and it perpetuated and confirmed that situation. * * * We do not find in this constitution any provision which in itself operated to abrogate existing treaties or to affect the status of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed."

Now to what category does the treaty of 1839, guaranteeing the neutrality and independence of Belgium belong? Is it one of those instruments that might have compromised the union of the German Empire and consequently non-obligatory upon it, if denounced in proper time? Strictly speaking the answer may be in the affirmative although there may be strong reasons for holding the contrary, on account of the preponderant position held by Prussia in the confederation and the fact that her sovereign was also the Emperor of the German Empire. Accepting then the construction most favorable to Germany, one would naturally ask why the far-sighted Prince Bismarck did not at that time denounce the treaty of 1839 as being detrimental to the interests of the Empire? To ask the question is to answer it. Simply because he thought that the existence of that instrument at that time (the school of Bernhardi being of later creation) corresponded to the interests of Germany, as well as of Prussia. The reason that it was not denounced up to the outbreak of the present war —although the plans for the invasion of France through Belgium were prepared long ago—was no doubt the fear of involving Germany in a war with Great Britain. It was very prudently thought that military considerations dictated silence and circumspection until the arrival of the day of surprise, when diplomatic papers may easily be cast to the waste-basket, since "the vital interests" of Germany were considered as being paramount to any "scraps of paper" and that "necessity knew no law."[10]

Coming now to the other argument that the creation of a large army, the building of fortresses and the acquisition of a colony of Belgium invalidated the treaty of 1839, we should from the outset state that the discussion will be only academic because official Germany did not set up this defense.

The right of Belgium to have an army, irrespective of its size, was never questioned by any of the parties to the treaty of 1839. Not only can the increase of the army of Belgium and the building of fortresses in no way affect the treaty of neutrality, but on the contrary it can strengthen it by its effectiveness better to defend the neutralized neutrality against a foreign invasion. As a general rule

[10] Dr. von Bethmann-Hollweg, the Imperial Chancellor, speaking in the Reichstag on December 2, 1914, said "We notified Belgium that the necessities of self-defence would compel us to march through Belgium."

all the perpetually neutralized states have that right, unless it is specifically withdrawn from them as it has been done in the treaty of 1867 guaranteeing the permanent neutrality of Luxemburg.

Now as for the other argument that the acquisition by Belgium of a colony in Africa vitiates, so to say, the treaty of 1839 guaranteeing her neutrality, it should be admitted that this theory is not new, and has already been discussed by various internationalists, particularly at the time of the incorporation of the independent state of Congo to Belgium, which took place, as it is known, in 1908, through the cession of the rights of sovereignty over the former state by the late King Leopold to Belgium.

The controversy, however, on this point has only been academic—and will therefore be treated as such—because the contracting parties to the treaty of 1839 have never raised the question. Moreover, some of them have actually recognized, either directly or indirectly, the annexation of the state of Congo to Belgium without any reservation whatever as to their treaty obligations towards the latter country.[11]

In fact, there exist two doctrinal views on the point. According to the one, which is that of the great majority of the writers who have discussed this question, the acquisition of the Independent State of Congo by Belgium did not in the least impair the validity of the treaty of 1839, but they also assert that the obligations resting upon the guaranteeing Powers by that treaty do not extend to the colonial possessions of Belgium, because the contracting parties to that instrument guaranteed only the territory of Belgium proper.[12]

[11] Treaty concluded between Belgium and France as to the right of presumption of the latter Power over the Belgium Colony of Congo, in case Belgium should subsequently wish to renounce her right of sovereignty over that African Colony. Also a treaty with Great Britain in regard to the lease in perpetuity of certain territory to Congo, which territory will revert to the former country in case Belgium wished to abandon her African colony. See particulars in an elaborate article entitled "L'Annexion du Congo á la Belgique," by Paul Fanchille, in Revue Générale de Droit International Public II, 432 et seq. 1895. The German Government recognized the annexation of Congo to Belgium. Thus, on January 22, 1909, the Under Secretary of Foreign Affairs of Germany, speaking before the Budget Commission, declared that his Government took notice of the communication of the Belgian Government that the Independent State of Congo was incorporated to Belgium and that therefore the annexation became an accomplished fact. Roger Brunet, L'Annexion du Congo a la Belgique et le Droit International 164.

[12] A. Rivier, Principes du Droit des Gens, I, 172-173. R. Brunet, L'Annexion du Congo a la Belgique, 141-143. E. Descamps, La Neutralité de la Belgique, 50 et seq. A. Merignac, Traité de Droit Public International II, 53-54. E. Nys, Le Droit International I, 429 et seq; the same writer in Etudes de Droit International, deuxieme série, 145; the same writer in Revue de Droit International et de Législation Comparée. Deuxieme série III, 28, 1901. J. Westlake in same review, 394. This distinguished English author is of opinion that it is safer in such cases for the neutral state to come to a previous understanding with the guaranteeing powers. Also, by the same writer, International Law I, 29, where he says that if the neutralized state extends its territory without the consent of the guarantors, it raises the dangerous question whether the guarantee continues to exist even for its original territory. J. Westlake International Law I, 29.

According to a second opinion, which is that of the minority, the guarantee of the neutrality of Belgium has been vitiated on account of the acquisition by her of the Independent State of Congo, but a specific declaration from the guaranteeing States may reestablish the former condition.[13]

Another French author holds also that Belgium infringed her privileged status guaranteed by the treaty of 1839 by the incorporation of the Congo State, but this writer sees a palliation of this infringement in the express or tacit consent of the guarantors for the acquisition of the Congo State by Belgium. He, however, is of opinion that a new declaration by the Powers who guaranteed the neutrality of Belgium, might obviate complications in the future.[14]

On the other hand the Belgian Government going to the other extreme, asserts that the guarantee of the neutrality of Belgium extends *ipso facto* to her African colony, and therefore the neutrality of the former Independent State of Congo, which was merely recognized, but not guaranteed, is merged, so to say, in the guarantee of the neutrality of Belgium, since, as they contend, the African colony is now part of Belgium.[15]

This is no doubt a very bold view and lacks the essential foundation for its support, namely a special treaty to that effect, and in the absence of such a specific instrument, the guarantee embodied in the treaty of 1839 cannot *ipso facto* extend to the African colony of Belgium, the Powers having expressly guaranteed the territory of the latter country.

Another apologist of Germany,[16] referring to the treaty of 1839, comes also to the same conclusion as Prof. Burgess, but in a different way. This writer brushes aside the famous instrument of 1839 as being null and void, for the simple reason, as he puts it, that Belgium was (and not is) a sovereign State, and that as such she had the "undoubted right to cease being neutral whenever she chose by abrogating the treaty of 1839," that "she had promised (in 1839) to five Powers that she would remain perpetually neutral. These Powers in their turn had promised to guarantee her neutrality." After laying down this historically false premise, he draws the above conclusion; but this writer does not tell us when Belgium abrogated the treaty of 1839. After making an unjuridical comparison between treaties of peace and those of perpetual neutrality, he comes abruptly to the conclusion that Germany had the right to set at naught the treaty guaranteeing the neutrality and independence of Belgium, because,

[13] Paul Fanchille, in Revue Générale de Droit International Public II, 416 et seq.

[14] F. Despagnet, in Essai sur les Protectorats, 286 et seq. Article by the same writer on this subject in Revue Bleue, June 23, 1894.

[15] Declaration of Belgian Government in the Legislative Chambers, February, 1895. See also Fanchille in Revue Générale de Droit International Public II, 416 et seq.

[16] Edmund von Mach, in New York Times of November 1, 1914.

as he alleges, the latter country violated it. This apologist of Germany also holds that the treaty of 1839 is obsolete and quotes Mr. Gladstone as his authority, who, according to his (Dr. Mach's) opinion "very clearly stated that he did not consider the treaty of 1839 enforceable." Now as a matter of fact the famous British statesman, as it will be hereafter seen, never gave such a construction to that instrument.

After disposing of the treaty of 1839 in such a formal manner, Dr. von Mach tells us that the neutrality of Belgium rests on the stipulations of the second Hague Peace Conference. We also learn from him that the first Hague Convention contained no rules forbidding belligerents from entering neutral territory, and that "in the second Conference it was thought desirable to formulate such rules," because, according to this internationalist, "it was felt that in war belligerents are at liberty to do what is not expressly forbidden." We are further told that Germany and Belgium have ratified the whole Convention, and one would naturally expect him to draw the conclusion that at least these two powers are bound to respect the rules on neutrality laid down in that instrument, namely, that "the territory of neutral powers is inviolable" and that "belligerents are forbidden to move troops or convoys * * * across the territory of a neutral power." Instead of arriving at this conclusion he dilates upon the refusal of Great Britain to ratify that Convention which naturally cannot relieve the responsibility of Germany towards Belgium. This apologist of Germany entirely loses sight of the fact that it is not the Hague or other Conventions that created international law, and that the rules governing neutrality, as many others of a similar character, have existed for centuries and have been in use among civilized nations and that belligerents in the absence of written compacts are guided by these rules and regulations.

Reverting now to the contention that Belgium was at liberty to renounce her privilege of being permanently neutral, the historical facts prove the contrary. Any one acquainted with the diplomatic history of the neutralization of Belgium must have noticed that that situation was imposed upon that country, not so much in the interest of the latter, as in that of the guaranteeing States. The fear of the absorption of Belgium by France was at that time the principal motive of the conclusion of the treaty of 1839. As a distinguished Belgian jurist well observes, in the permanent neutralization of States which took place in the course of history, the interests of the guaranteeing States was to such a degree preponderant, that it was the only thing that was considered.[17]

[17] E. Nys, Le Droit International I, 429. Also Rivier, Principes du Droit des Gens I, 116, and Merignac op. cit. II, 59.

Now coming to the treaty of 1870, which is adduced by the friends of Germany as evidence as to the alleged obsolescence of the Convention of 1839, one can only refer them to a careful reading of that treaty, which speaks for itself.

In fact not only the context of that treaty or treaties of that date concluded for the maintenance of Belgian neutrality, but also the diplomatic history of that time show clearly that the contracting parties to those instruments far from considering the treaty of 1839 as obsolete, have on the contrary distinctly affirmed that the former were concluded for the maintenance of the latter.

Two separate and identical treaties were concluded in 1870, the one between Great Britain and France and the other between Great Britain and Prussia. The preamble of both these instruments runs as follows:

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the King of Prussia (or the Emperor of the French, as the case might be) being desirous at the present time of recording in a solemn act their fixed determination to maintain the Independence and Neutrality of Belgium, as provided in Article VII of the Treaty signed at London on the 19th of April, 1839, between Belgium and the Netherlands, which Article was declared by the Quintuple Treaty of 1839 to be considered as having the same force and value as if textually inserted in the said Quintuple Treaty, their said Majesties have determined to conclude between themselves a separate Treaty which without impairing and invalidating the conditions of the said Quintuple Treaty shall be subsidiary and accessory."[18]

There can certainly not be plainer language than this. The contracting parties concluded the Treaties of 1870 because they desired, as they asserted, to record in a solemn act their determination to maintain the neutrality of Belgium as provided in the treaty of 1839 "without impairing or invalidating that instrument, which shall be subsidiary and accessory to it."

But Article III is not less clear. It is as follows:

"This Treaty (of 1870) shall be binding on the High Contracting Parties during the continuance of the present war between the North

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Sir Edward Grey, the British Secretary of State for Foreign Affairs, speaking in the House of Commons on August 3, 1914, on the subject of Belgian neutrality, and referring to the treaty of 1839, said: "It is one of those treaties which are founded, not only on consideration for Belgium, which benefits under the treaty, but in the interests of those who guaranteed the neutrality of Belgium." London Times, August 4, 1914.

See also Protocol of February 19, 1831, where it is stated that the reasons for the neutralization of Belgium were the establishment of a just equilibrium in Europe and the maintenance of general peace. Sir R. Phillimore, Commentaries on International Law, I, 495 ed. 1871.

[18] Hertslet, Map of Europe by Treaty III, 1886.

German Confederation and France, and for 12 months after the ratification of any Treaty of Peace concluded between those Parties; and on the expiration of that time the Independence and Neutrality of Belgium will, so far as the High Contracting Parties are respectively concerned, continue to rest as heretofore on Article I of the Quintuple Treaty of the 19th of April 1839."

From the above extracts it is evident that the contracting parties to these instruments, namely the treaties of 1870, never lost sight of the validity of the treaty of 1839. Therefore the argument as to the obsolescence of the latter instrument falls to the ground.

Let us now go beyond the treaty of 1870 and see whether there really existed serious reasons which prompted the British Government to secure the conclusion of additional treaties for the preservation of the neutrality of Belgium during the Franco-German war of 1870.

Looking into the diplomatic history and parliamentary debates of Great Britain of that time one can preceive two things: first, the extreme solicitude and concern of the British Government for Belgium; second, the indifference and, one may say, the apathy towards the Grand Duchy of Luxemburg, although the neutrality of that country was also guaranteed by a solemn instrument, namely the treaty of 1867, to which Great Britain was also a party. While the violation of the neutrality of Belgium was always considered by England as a *casus belli* and gave rise to the participation of the latter country in the present war, the similar act of Germany against the Grand Duchy of Luxemburg, whose territory was also declared perpetually neutral by a solemn treaty, hardly attracted any attention, nor can it be said that the Government of the Grand Duchy acquiesced in that act willingly; on the contrary, they strongly protested against the violation of their neutrality by Germany.

An historical review of this question will explain the reasons of the discrimination, so to say, made by Great Britain between Belgium and the Grand Duchy of Luxemburg, and will also give us a clue to the causes which led to the conclusion of the treaties of 1870, guaranteeing for the second time the neutrality of Belgium during the Franco-German war of that time and a year after the conclusion of peace, as above explained. But in order to understand that we must look a little into the history of the Grand (but in fact the small) Duchy of Luxemburg.

By the Congress of Vienna of 1815 the territory or province of Luxemburg was created into a state under the name of Grand Duchy of Luxemburg and was placed under the Sovereignty of the King of the Netherlands (Holland), with the title of Grand Duke of Luxem-

burg.[19] When in 1831 Belgium was constituted into a separate state, part of the territory of Luxemburg was given to Belgium now forming the Province of Luxemburg.

On the dissolution of the German Confederation in 1866, Napoleon III tried to incorporate the Grand Duchy of Luxemburg to France by purchasing it from the Sovereign of the Duchy, namely, the King of the Netherlands. This attempt was then frustrated by the King of Prussia who, however, claimed in his turn—notwithstanding the severance of the connection of the Grand Duchy from the German Confederation—that he had still the right to maintain a Prussian garrison in the fortress of the city of Luxemburg, to which France strenuously objected. The matter came to an impasse and France and Prussia were nearly on the verge of war when through the mediation of England the contending parties reached a compromise. France withdrew her plan of purchase and Prussia undertook to withdraw her garrison, on condition that the Grand Duchy should be declared perpetually neutral under the collective guarantee of several Powers, which proposition was ultimately accepted and embodied in a treaty. What is important to note is that it was at the request of Prussia and not of France that the Grand Duchy of Luxemburg was neuralized and placed under the collective guarantee of the Powers; and it is Germany now, and not France, that violated the neutrality of that country.[20]

In consequence of the above arrangement, a treaty was concluded at London on May 11, 1867, guaranteeing the perpetual neutrality of the Grand Duchy of Luxemburg, and Article II of that instrument declares that:

"The Grand Duchy of Luxemburg within the limits determined by the Act annexed to the treaties of 19th April 1839, under the guarantee of the Courts of Great Britain, Austria, France, Prussia, and Russia shall henceforth form a perpetually Neutral State. It shall be bound to observe the same neutrality towards all other States. The High Contracting Parties engage to respect the principle of Neutrality stipulated by the present Article.

"That principle is and remains placed under the sanction of the collective Guarantee of the Powers signing Parties to the present treaty, with the exception of Belgium, which is itself a Neutral State."[21]

The engagement taken by the British Government by the treaty of

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[19] Eyschen, Das Staatsrecht des Grossherzogtums, 6 et seq.

[20] E. Servais, Le Grand Duché de Luxemburg et le Traité de Londres, 53-118, and 145.

[21] Herstlet, Map of Europe by Treaty III, 1803.

1867 had during the negotiations for its conclusion and subsequently stirred public opinion in England because the British public could not see why their country should assume such a heavy responsibility for a State in which the British interests were not in any way involved.

The Government, which was then presided over by the Earl of Derby, explained through its Ministers, in both Houses of Parliament, the limitations of the responsibility undertaken by Great Britain by the Treaty of 1867 in regard to the guarantee of the neutrality of Luxemburg, which may be interesting to summarize as having both a retrospective and actual interest. Thus Lord Stanley, then Secretary of State for Foreign Affairs, speaking on the subject in the House of Commons on June 14, 1867, said, among other things, that he had hesitated for two or three days before giving his assent to the arrangement. "In giving it," he said, he "acted under a feeling of doubt and anxiety such as" he "never felt upon other public questions," and pointed out that the alternative would have been war between France and Prussia. The Secretary of State concluded his speech with the following significant words, which have a bearing upon the present question: "Even if England had been able to keep out of it [of the war] which of course we should have desired, it might have been difficult, especially if Belgium had been attacked."[22]

Two days after the signature of this treaty, namely, on May 13, 1867, the Earl of Derby, answering a question in the House of Lords as to whether Great Britain could be called upon to enforce the treaty by force of arms in case the neutrality of the Grand Duchy of Luxemburg was violated, said: "The guarantee [of Luxemburg] is not a joint and separate guarantee, but is a collective guarantee, and does not impose upon this country any special duty of enforcing its provisions. It is a collective guarantee of all the Powers of Europe."[23]

On June 14, 1867 Mr. Labouchere (the well known late editor of TRUTH) brought up the same question before the House of Commons again, by asking the Secretary of State for Foreign Affairs for information as to the extent of the obligations of Great Britain in regard to the treaty of 1867. Lord Stanley, after referring to the Treaty of 1839 guaranteeing the possession of Luxemburg to the King of Holland, said: "The guarantee now given is collective only. That is an important distinction. It means this, that in the event of a violation of neutrality all the powers who have signed the treaty may be called upon for their collective action. No one of these powers is liable to be called upon to act single or separately. It is a case, so to speak, of limited liability. We are bound in honor, you cannot place

[22] Hansard, third series, 187, 1910.
[23] Hansard, ibid., 187, 379.

a legal construction upon it, to see in concert with others that these arrangements are maintained." * * * "If they decline to join us, we are not bound single handed to make up the deficiencies of the rest. Such a guaranty has obviously rather the character of a moral sanction to the arrangements which it defends, than that of a contingent liability to make war, but it would not necessarily impose the obligation."[24]

The Foreign Secretary, in order to prove that the guarantee of the neutrality of a State is not always a legal obligation but a discretionary right for the guarantor to use its forces for the enforcement of the neutrality by others, brought the example of the guarantee of the neutrality of Switzerland and of the extinct republic of Cracow in Poland, and said: "If all Europe combined against the republic (Switzerland) England would hardly be bound to go to war with all the world for its protection." Then referring to the violation of the pledge which had been given by certain powers to the Polish Republic, "we were parties to the arrangements which were made about Poland; they were broken, but we did not go to war. I only name those cases, as showing that it does not necessarily and inevitably follow that you are bound to maintain the guarantee under all circumstances by force of arms."[25]

The question came up again on the 20th of June in the House of Lords and the speeches made during that debate in the Upper House are not less interesting, particularly the utterances made on the subject by the Prime Minister and Lord Clarendon, whose opinions are now endorsed by the present British cabinet.[26]

Thus the Earl of Derby, answering a criticism of the construction given to the treaty (of 1867) by the Cabinet, said: "I do not entirely agree with the noble Earl (Earl Russell) as to the extent of our responsibility. * * * If it had been a continuance of the guarantee first given, I should think it a very serious matter, because the guarantee of the possession of Luxemburg to the King of Holland was a joint and several guarantee similar to that which was given with regard to the independence and neutrality of Belgium; it was binding individually and separately upon each of the powers. That was the nature of guarantee which was given with regard to Belgium and with regard to the possession of Luxemburg by the Duke-King.[27] Now a guarantee of neutrality is very different from a guarantee of possession. If France and Prussia were to have a quarrel between

[24] Hansard, ibid., 187, 1910-1923.

[25] Hansard, ibid., 187, 1923.

[26] Despatch of Sir Edward Grey to Sir F. Bertie, British Ambassador at Paris, in White Paper no. 148.

[27] The King of Holland, who was also Grand Duke of Luxemburg.

themselves, and either were to violate the neutrality of Luxemburg by passing their troops through the Duchy for the purpose of making war on the other, we might, if the guaranty had been individual as well as joint, have been under the necessity of preventing that violation, and the same obligation would have rested upon each guarantor; but as it is we are not exposed to so serious a contingency because the guarantee is only collective, that is to say, it is binding only upon all the Powers in their collective capacity; they all agree to maintain the neutrality of Luxemburg, but not one of the Powers is bound to fulfil the obligation alone. That is a most important difference, because the only two Powers by which the neutrality of Luxemburg is likely to be infringed are two of the parties to the collective guarantee; and therefore if either of them violates the neutrality, the obligation on all the others would not accrue."[28]

Lord Clarendon, who was above referred to, in endorsing the standpoint of the Cabinet, said: "With regard to the guarantee, I will go somewhat further than the noble Earl at the head of the Government, and say that if we had undertaken the same guarantee in the case of Luxemburg as we did in the case of Belgium, we should, in my opinion, have incurred an additional and very serious responsibility. I look upon our guaranty in the case of Belgium as an individual guarantee, and have always so regarded it; but this is a collective guarantee. No one of the Powers, therefore, can be called upon to take single action, even in the improbable case of any difficulty arising. I cannot help regarding this guarantee as a moral guarantee, a point of honor, as an arrangement which cannot be violated without dishonor by any of the signing Powers; and I believe an agreement of that nature may be more binding than the precise terms in which a treaty is couched, for it is a characteristic of these times that when formal treaties are found inconvenient, they are disregarded."[29]

The Earl of Granville, who subsequently (in 1870) became the Secretary of State for Foreign Affairs of the Cabinet presided over by Mr. Gladstone, although he approved the treaty of 1867, disapproved the construction given to it by the Government. "If Her Majesty's Government," he said, "instead of increasing our liabilities, have actually diminished them, it appears to me that there has been the most complete mystification of some of the most distinguished diplomatists of Europe ever heard of, * * * and further, "in spite of these fanciful interpretations as to how far we are bound by treaties, it is possible that we may have rendered ourselves liable at some

[28] Hansard, ibid. 188, 146 et seq.
[29] Hansard, ibid. 188, 152-153.

future time to practical inconvenience, or the risk of being considered unfaithful to our agreements."[30]

The obligation undertaken by the British Government by the guarantee of the neutrality of Luxemburg was considered to be so important that it was again discussed in the House of Lords on July 4, when the Earl of Derby spoke again on behalf of the Government in answer to a criticism made on the treaty by Lord Houghton.

"Whatever the interpretation," said the Prime Minister, "which I may put on particular words of the treaty, or whatever the interpretation which Her Majesty's Government may put on it, such interpretation cannot affect the international law by which the terms of all treaties are construed. I am not much skilled in the ways of diplomatists, but I believe that if there be one thing more clear than another it is the distinction between a collective and a separate and several guarantee. A several guarantee binds each of the parties to do its utmost individually to enforce the observance of the guarantee. A collective guarantee is binding on all the parties collectively; but if any difference of opinion should arise no one of them can be called upon to take upon itself the task of vindication by force of arms. The guarantee is collective, and depends upon the union of all the parties signing it; and no one of those parties is bound to take upon itself the duty of enforcing the fulfilment of the guarantee. As far as the honor of England is concerned, she will be bound to respect the neutrality of Luxemburg; * * * but she is not bound to take upon herself the Quixotic duty, in the case of a violation of the neutrality of Luxemburg by one of the other Powers, of interfering to prevent its violation because we have only undertaken to guarantee it in common with all the other great Powers of Europe. If the neutrality should be violated by any of them, then I say it is not a case of obligation, but a case of discretion, with each of the other signatory Powers as to how far they should singly or collectively take upon themselves to vindicate the neutrality guaranteed."[31]

The Earl of Derby in concluding his speech made again the distinction between the collective or common guarantee of the neutrality of Luxemburg and the single or separate of that of Belgium, and said that in the latter case the obligation was not discretionary as in the former. He illustrated his point of view by reminding the House of the two separate treaties concluded in 1856 concerning the guarantee of the integrity and independence of the Ottoman Empire, by which instruments some of the contracting parties undertook only to respect

[30] Hansard, ibid. 188, 154.
[31] Hansard, ibid. 188, 967 et seq.

that engagement, and others to enforce it, in case of the violation of its stipulations.

The distinction between a collective or common and a separate or single guarantee, and the difference as to the effects resulting from each of them in international instruments is criticised by the majority of the writers of the law of nations, but a respectable minority endorses, in a general way, the doctrine as was expounded by the British Ministers in 1867.

The great majority of the writers on the law of nations, in discussing the question of conventional guarantee, divide it into a single guarantee on one side, and collective on the other.

A guarantee is called single when it is given either by one or by various States without creating a legal connection between them in regard to the guarantee that each of them gave separately; in such a case, there is only an additional or additional guarantees.

It is called, on the contrary, collective or joint guarantee when the guaranteeing States undertake mutually to insure the same privileges to a State. In the latter case, two legal connections are created; one between the guarantors, each being obliged towards the others to carry out faithfully the obligation undertaken towards the guaranteed State; the other, between the guarantors and the guaranteed State, each being bound to fulfill its pledge, either alone or jointly with the other guarantors.[32]

According to a distinguished Swiss jurist and late Professor of International Law at the University of Brussels, the guarantee is collective, joint and mutual, when it is given by two or more States, by one and the same treaty and for one and the same condition of things. This writer holds that is immaterial whether any of the above names—collective, joint, or mutual—are expressly used in the instrument of guarantee and that their absence cannot alter the character of the joint obligation. In such a guarantee each guarantor is bound to carry out an indivisible obligation, but has also the right to come to a previous understanding with the co-guarantors in order to take a common action. If after consultation the guarantors cannot agree, each guarantor is nevertheless bound to execution of the obligation.

Now if the guarantee is collective and separate then the independent action upon the part of each guarantor is presumed, because in this case it is given expressly.

Then referring to the necessity of unanimity of action in a collective guarantee, he asserts that it is not necessary that there should be

[32] Henry Bonfils, Manuel de Droit International Public, Quatrième édition par Paul Fanchille, 492-493. Despagnet, Cours de Droit International Public, 503 (ed. 1899.) Milovanovitch, Des Traités de Garantie, 5 et seq.

unanimity, because if that was the case the collective guarantee would have been weaker than the simple guarantee, and often illusory. If a guarantor would allege that the intention of the contracting parties was to exclude a separate action, it is for such a guarantor to furnish the proof in order to sustain his allegation, because to presume such an intention would have been contrary to the original object of the guarantee, which is to insure and strengthen the guaranteed right.

This construction of the word collective is contrary to the views of the British Cabinet in connection with the treaty of 1867 guaranteeing the neutrality of the Grand Duchy of Luxemburg. This author calls those views erroneous.[33]

One of the most eminent contemporary Belgian jurists in affirming the division of guarantees into single on one hand, and joint and collective on the other, adds that, although the text of the treaty of 1839, guaranteeing the neutrality of Belgium, does not contain the words joint and collective, that guarantee is nevertheless a joint one, because it was not given separately by the five Powers, but jointly. He also criticises the British point of view in regard to the word "collective," and calls it a "strange view."[34]

A famous Swiss-German author is also of opinion that in a collective guarantee, each guarantor—after trying to come to a previous understanding with the co-guarantors and failing to agree on a common action—is bound to carry out alone the treaty stipulations because, he says, it is contrary to good faith to give only a moral value (this being an allusion to the British Minister's expression in 1867) to the collective guarantee, under the pretext that it is difficult for the guarantors to agree unanimously.[35]

Another German specialist on International Law, after making a distinction between a collective and collective and separate guarantee, holds that the latter is more strictly obligatory, in this sense, that each of the guarantors is bound to intervene, regardless of the inaction of the other co-guarantors. But this writer does not thereby conclude that the mere collective guarantee is not obligatory. On the contrary, he asserts that in a collective guarantee all the guarantors are "correi debendi." He also criticizes Lord Stanley's expression of "moral guarantee," and calls it a sophistry. Treaties are not concluded, he adds, in order to create engagements of honor.[36]

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[33] A. Rivier, Principes du Droit des Gens II 104-105. Also F. Despagnet ibid, 144.

[34] For particulars, see E. Nys, Etudes de Droit International et Droit Politic, 158-163: E. Nys, Revue de Droit International et de Legislation Comparée III, 40 et seq.; E. Nys, Le Droit International III, 40-41.

[35] Bluntschli, Le Droit International Codifié traduit par Lardy, article 440 and note.

[36] F. H. Geffcken in Heffter's Droit International de l'Europe, traduit par J. Bergson, 219 note 8; also Geffcken in Holtzendorf's Handbuch des Völkerrechts III, 109.

Various other writers approve the above views as to the guarantee undertaken by the treaty of 1867 in regard to the neutrality of Luxemburg and consider that the guarantee given by that instrument is not a "moral obligation," but an obligation and that unanimity is not essential for putting it into execution.[37]

A distinguished Russian author disapproves also the above views of the British Ministers, and, although he holds that in a collective guarantee each guarantor is bound to carry out his engagement, thinks that a guaranteeing State is not bound to sacrifice her own existence to save another power.[38]

The British writers on International Law do not seem to be profuse on this controverted point. One of them, referring to it incidentally and commenting on the ambiguity of the construction given to collective guarantee by the Derby Cabinet in 1867, says: "It would be well to abstain from couching agreements in terms which may seriously mislead some of the parties to them, and to avoid making agreements at all which some of the contracting parties may intend from the beginning to be illusory.[39]

While the writers on International Law generally disapprove the construction given by the British Ministers to the stipulations of the treaty of 1867, in regard to Luxemburg, a few of them, without approving the words "moral obligation," countenance in substance the stand taken in 1867 by the Derby Cabinet.

One of the most learned French writers on International Law and Diplomacy, in discussing the question of treaty guarantees, says: "There are two kinds of guarantees, one is the simple guarantee, namely, when two or more Powers guarantee the perpetual neutrality of a State, without an express stipulation that such neutrality is placed under their common guarantee; such neutrality is then under the guarantee of each contracting party and also under that of all of them. In such a case the neutralized State or the co-guarantors have the right to invoke the execution of the stipulation of guarantee against each guarantor, if such neutrality is violated by any Power. This kind of guarantee is obligatory upon all acting in common or separately.

"The other is called collective or common guarantee, when it is

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[37] E. Descamps, Neutralité de La Belgique, 541-542. This writer is an Ex-Senator of the Belgian Senate and also Professor at the University of Louvain. Also C. Piccioni, Essai sur la Neutralité Perpetuelle, 13 et seq.

[38] F. de Martens, Traitè de Droit International, traduit par Alfred Léon, I 554, 555.

[39] Hall, A Treatise on International Law (ed. 1884), 316.

[40] F. Pradier-Fodéré, Traité de Droit International Public, II, nos. 1010-1012. Two other eminent French writers approve this view and also the division as above given by the last author, Funck Brentano and Albert Sorel, Précis du Droit des Gens, 354-357. See also Calvo, Le Droit International Theorique et Pratique, IV, 499.

expressly stipulated as being such, like that of the treaty of 1867 guaranteeing the neutrality of Luxemburg. In the latter case the guarantors may be asked to intervene in case the guaranteed neutrality is violated, and they may act either in common or separately." In case of disagreement, one of them only can act irrespective of the other, but this writer holds that in the latter case a guarantor has the discretion and not the obligation to intervene. He therefore approves the viewpoint of the British Ministers in 1867. "What was provided in the treaty" (guaranteeing the neutrality of Luxemberg), he says, "is a collective action." "Does it not seem," he asks, "that to put all the weight of the guarantee on one Power only would be beyond the limits and the provisions of the Treaty?" He, however, admits that as long as there exist a sufficient number of Powers agreeing to intervene, the opposition of one cannot prevent the others from acting.[40]

One of the most distinguished citizens of the Grand Duchy of Luxemburg, who represented his country at the Conference of London of 1867, commenting on the treaty guaranteeing the neutrality of Luxemburg, throws a great deal of light on the diplomatic history of this subject.

In referring to the negotiations previous to the conclusion of that treaty, he tells us that these had been initiated by Austria, that Russia proposed the Conference, taking as a basis the neutralization of the Grand Duchy, but that it was Prussia who requested the insertion of the stipulation of guarantee of the Powers; further that both Prussia and Austria considered at the time that the neutralization should have been similar to that of Belgium. This writer therefore considers the British view as being untenable and contrary to the spirit of the negotiations which culminated in the conclusion of the treaty of 1867. In support of his view he quotes, as do other writers, an extract from Bismarck's speech of September 24, 1867, made in the Diet of the then German Confederation, when the future Iron Chancellor of Germany, referring to the withdrawal of the Prussian garrison from Luxemburg, said: "We have obtained a compensation in the neutralization of the territory of Luxemburg by the European guarantee, in the maintenance of which I have faith notwithstanding all cavil." (That being an allusion to the construction given to the treaty of 1867 by the Derby Cabinet.)[41]

There is evidently a misconception as to the meaning of the unfor-

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[41] E. Servais, Le Grand Duché de Luxemburg et le Traité de Londres, 56 et seq.

See also the work of another eminent citizen and Premier of the Grand Duchy in which he confirms the facts mentioned by the previous writer and disapproves of the views of the Derby Cabinet. Eyschen, Das Staatsrecht des Grossherzogtums, 19 et seq.

See protest of Council of State of Luxemburg against the British Cabinet's views in Funck Brentano and Sorel, op. cit. appendix, 506.

tunate expression used by the British Ministers in explaining to Parliament the liability of England resulting from the treaty of 1867. What Lord Derby and his "noble relative" (as Parliamentary usages required him to call his son, Lord Stanley) meant by "moral obligation" was that Great Britain was not bound, single handed, to protect Luxemburg, if her neutrality was violated. What was uppermost in the mind of the then Secretary of State, before assenting to the signature of that instrument (which he did, as he said, reluctantly), was a collective action of the Powers. What is important to note is, that notwithstanding the criticism at that time of the Liberal Party as to the expression "moral obligation," the Liberal Party of today, through its Secretary of State for Foreign Affairs, endorsed the point of view of the Derby Cabinet. In fact, we see that Sir Edward Grey, writing to the British ambassador at Paris on August 2, 1914, says: M. Cambon [the French ambassador at Berlin] asked me about the violation of Luxemburg. I told him the doctrine on that point laid down by Lord Derby and Lord Clarendon in 1867.[42]

It should, however, be observed, that in assuming such an obligation as the guarantee of the neutrality of a State it is imperative for the guaranteeing Power to express from the beginning its point of view on its eventual liability, and not to give hopes to small and weak States whose whole existence may be at stake, so that they may at the outset regulate their policy in order to safeguard their existence.

As an English writer observes, Great Britain has signed so many of these treaties—some, it is true, in conjunction with other Powers—that "some of the engagements are absolute, others conditional, some are joint, others several, and as if to complicate the position as much as possible, the terms of many treaties are couched in language so vague and so indefinite, that it is almost impossible to say what England—or some other Power—is bound to do, what she can call on the other signatories to perform."[43]

This explains the theoretical and doctrinal side of the obligation incumbent upon Great Britain and the other Contracting Parties to the Treaty of 1867 who guaranteed the neutrality of the Grand Duchy of Luxemburg, which was so wantonly violated by Germany in the present war, but attracted very little attention in belligerent and neutral countries. As a matter of fact the German Government did not seriously attempt to justify its action in the case of Luxemburg as in that of Belgium.

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[42] White Paper no. 148.

[43] J. E. C. Munro, an article entitled England's Treaties of Guarantee, in Law Magazine and Review (4th series) May, 1881.

THE INTERNATIONAL STATUS OF THE GRAND DUCHY OF LUXEMBURG AND THE KINGDOM OF BELGIUM IN RELATION TO THE PRESENT EUROPEAN WAR.

II.

THE case of Belgium presents an entirely different aspect both from the legal and the political point of view. While the guarantee of the neutrality of Luxemburg interests—or interested at the time of the signature of the Treaty of 1867—France and Prussia only, and the other contracting parties (and particularly Great Britain) acceded to it, to use the words of Lord Stanley, "reluctantly," that of Belgium had and has an entirely different character so far as England is concerned. It affects her vital interests, namely, her own security. Hence the difference in the wording of the instrument guaranteeing the independence and neutrality of Belgium, and the alarm felt in Great Britain whenever an attempt was made for the violation of the stipulations of the latter treaty.

The interest of the British nation in the sacro-sanctum, one might say, of the inviolability of the Belgian territory,—which has now been shown in such a palpable way, came very near the same point, as it is known, during the Franco-German war of 1870. The views then expressed by the public men of Great Britain and the stand then taken by the British Government are very instructive as having a direct connection with the present controversy—or rather the efforts of some friends of Germany to prove the obsolescence of the Treaty of 1839.

The reason for the conclusion of the treaty or treaties of 1870 above referred to, was given in both Houses of Parliament at that time, and the attitude of the British Government in regard to Belgium was clearly shown during the Parliamentary debates. But, in order to understand better the question, it might be necessary to refer to some previous incidents which influenced the minds of the British Ministers to resort to the conclusion of an additional treaty guaranteeing again the neutrality of Belgium.

In the course of the year 1870—namely, on July 25, 1870—the Times divulged the secret negotiations then going on between France and Prussia for the incorporation of Belgium to the French Empire.

It seems that the King of Prussia had already acquiesced in gratifying the desire of Napoleon III. This intended infringement of the public law of Europe had provoked, as was natural, the anger of the English people and at the same time aroused the alarm of the British Government, the absorption of Belgium by either of the two Powers being considered as a menace to the security of Great Britain.

Therefore on the declaration of the war in 1870 this intrigue of the two belligerents was uppermost in the minds of the British Ministers, who, fearing that Belgium might (by the treaty of peace to be concluded after the termination of the hostilities), be incorporated to either France or Germany, proposed to both belligerents the conclusion of an additional treaty for the maintenance of the independence and neutrality of that country, without impairing the validity of that of 1839.[44] The proposal of the British Government received the approval of both Prussia and France and resulted in the compacts of 1870.

The debates in both Houses of Parliament in regard to these treaties are not only interesting, but throw a great deal of light as to British policy concerning the Belgian State.

Thus, Lord Granville, in explaining in the House of Lords, as a spokesman of the Government, on August 8, 1870, the reasons which prompted the cabinet to enter into a new treaty or treaties for the guarantee of the neutrality of Belgium, said: "We might have explained to the country and to foreign nations that we did not think this country was bound either morally or internationally or that its interests were concerned in the maintenance of the neutrality of Belgium. Though this course might have had some conveniences, though it might have been easy to adhere to it, though it might have saved us from some immediate danger, it is a course which Her Majesty's Government thought it impossible to adopt in the name of the country, with due regard to the country's honor and to the country's interests. Another course would have been that, maintaining our obligations such as they are described in the Treaty of 1839, we might have simply made a declaration of the determination of this country to resist any interference with the neutrality of Belgium by force of arms. Now in the first place, such a declaration would have been a direct menace to the Powers who are now

[44] On July 28, 1870, Prince Bismarck, then Count Bismarck, in trying to justify the attitude of Prussia on the secrecy of the negotiations for the incorporation of Belgium to France, said in his usual blunt way that he "kept the secret and treated the proposition in a dilatory manner" and that "it was no business of his to tell French secrets." John Morley, Life of Wm. E. Gladstone, vol. II, p. 342.

engaged in hostilities; in the second place it would have given an appearance of isolation to our policy; and in the third place I do not believe it was a course best calculated to prevent that particular event which we wish to avoid."

Lord Granville said that they had received the assurance from both belligerents that they would respect the treaty of 1839 but "we added," he continued, "that we thought there could not be a doubt of the duty of both those countries (France and Prussia) to maintain the obligations of the treaty (of 1839) which they had severally entered into in common with ourselves and with other countries but we had observed in the declaration of both that the promise was conditional on the other belligerent not violating it, and we could not help gathering from that, that, in the opinion of each, such an assurance was not of a complete character. We therefore proposed that if they wished to give a more patent proof to the world of their intention, or wished for a clearer assurance from us that we meant to maintain the independence of Belgium, we were ready either to enter into a treaty or in some solemn instrument to record our common determination."

Then, answering a criticism that the conclusion of the treaty of 1870 would invalidate that of 1839, Lord Granville said: "There is one objection which I believe is entirely without foundation—namely, that the very fact of the treaty which we propose being entered into, will in the slightest degree impair the obligations of the treaty of 1839. Those obligations we have expressly reserved in the words of this treaty."[45] That Prussia and the allied German States considered themselves bound by the treaty of 1839 is proved from a communication made by Prince Bismarck to the British Government. Referring to that communication Lord Granville said: "On the morning of that day (the 5th of August, 1870) Count Bernstorf (the Prussian Minister at London) told me he had received a message from Count Bismarck that he should be ready to concur in any measure which would strengthen the neutrality of Belgium."[46] While the Lords were listening to Lord Granville's speech, the Commons were addressed by Mr. Gladstone on the same subject. Mr. Gladstone, after referring to the proposition made to France and Prussia to sign a new treaty for the maintenance of the neutrality of Belgium during the war then going on between these two countries, and also to the readiness of Great Britain to join either belligerent in case the other should attempt to march its troops across Bel-

[45] Hansard, vol. 203, p. 1675.
[46] Hansard, vol. 203, p. 1675.

gium, explained to the House that after the war the contracting parties would fall back upon the obligations of the treaty of 1839. This shows clearly that the British Government had not concluded the treaties of 1870, because that of 1839 was obsolete, as some of the apologists of Germany allege, but for other reasons, some of which were given out in the course of the Parliamentary debates. In fact one of the principal objections made to the conclusion of the treaties of 1870 was the existence of the treaty of 1839. Mr. Disraeli (later Lord Beaconsfield) voicing the opinion of the opposition said in the House of Commons, in answer to Mr. Gladstone's explanations, that although he approved the policy of the Government in defending the neutrality of Belgium, which he called "a wise and spirited policy" and in his opinion, "not the less wise because it was spirited," he expressed his doubt as to the wisdom of concluding a new treaty of guarantee in view of the existence of that of 1839. Then the future Prime Minister of Great Britain, referring in a general way to the policy of England and the interest the country had in the Belgian coast, said "the policy of England ought certainly not to be a merely European policy. She has an ocean Empire, and an Asiatic Empire. But she has a great interest in the prosperity, the peace, and the independence of the various states of Europe. Viewing it from a very limited point of view, it is of the highest importance to this country that the whole coast from Ostend to the North Sea should be in the possession of free and flourishing communities, from whose ambition the liberty and independence of England nor of any country can be menaced. We find that of Europe at present constituted in such a manner, and it is well such a position of affairs should be maintained."[47]

Mr. Gladstone's answer to the mild criticism of his distinguished future opponent was clear and concise, and it may not be amiss to quote it verbatim: "The right honorable Gentleman (Mr. Disraeli) said that as a general rule he would rather trust to treaties which at present exist than cumulate them by other engagements. That observation reminded me that I might have pointed out more clearly what we thought was the necessity for this proposed treaty. When the war broke out, we naturally looked to the declaration of the belligerents as to the neutrality of Belgium, and we were obliged to admit * * * that those declarations contained everything that could reasonably have been expected from each Power speaking singly for itself; but, notwithstanding that, there was this weakness about them. In the event of the violation of the neutrality of Belgium by

[47] Hansard, vol. 203, pp. 1702-1704.

Prussia, France held herself released, and in the event of the violation of neutrality by France, Prussia held herself released. I think we had no right to complain of either Power. I think they said everything they could have expected to say; but we thought that by contracting a joint engagement we might remove the difficulty and prevent Belgium from being sacrificed, and render it extremely unlikely that anything would arise to compromise our neutrality. That was our reason for thinking a treaty of this kind necessary, because it is obvious that the treaty of 1839, whatever value it may possess, could hardly be supposed to meet the circumstances of the present case with reference to the declarations made by the belligerent Powers."[48]

On August 9, the treaties of 1870 were concluded and on the next day, on the prorogation of Parliament, the Queen's speech referring

[48] Hansard, vol. 203, p. 1705.

Mr. John Bright, then a member of the cabinet, disagreed with his colleagues on the Belgian question, being generally opposed to intervention on the continent. Speaking next day in the House on this subject, he said, "I protest against Quixotic expeditions, involving this country in difficulties from which it was difficult to escape * * * I do not believe I should live to see the day when any Prime Minister who was at once remarkable for intelligence and conscience would, under any pretext, do anything that would involve the country in a Continental war." Hansard, ib. p. 1740. Mr. Bright's prediction was true because he did not live to see the present great war.

During the negotiations for the conclusion of the treaties of 1870, Mr. Gladstone, writing to Mr. Bright on August 1, said, "Although some members of the cabinet were inclined on the outbreak of this most miserable war (of 1870) to make military preparation, others, Lord Granville and I among them, by no means shared that disposition, nor, do I think, the feeling of Parliament was that way inclined. But the publication of the treaty has altered all this, (meaning the projected agreement between France and Prussia for the incorporation of Belgium to the former country as above explained) and has thrown upon us the necessity either of doing something fresh to secure Belgium, or else of saying that under no circumstances would we take any step to secure her from absorption. This publication has wholly altered the feeling of the House of Commons, and no government could at this moment venture to give utterance to such an intention about Belgium. But neither do we think it would be right, even if it were safe, to announce that we would in any case stand by with folded arms, and see actions done which would amount to a total extinction of public right in Europe." Life of Wm. E. Gladstone, by John Morley, vol. II, p. 341.

Mr. Gladstone rightly predicted that his country would not stand with folded arms if the neutrality of Belgium was violated. Writing again on the 4th of August to the same friend, he emphasized his point of view by stronger language. "The recommendation set up in opposition to it (to the conclusion of the treaties of 1870) generally is that we should simply declare we will defend the neutrality of Belgium by arms in case it should be attacked. Now the sole or single-handed defense of Belgium would be an enterprise which we incline to think Quixotic. * * * If the Belgian people desire, on their account, to join France, or any other country, I for one, will be no party to taking up arms to prevent it. But that the Belgians, whether they would or not, should go 'plump' down the maw of another country to satisfy dynastic greed, is another matter. The accomplishment of such a crime as this implies, would come near to an extinction of public right in Europe, I do not think we could look on while the sacrifice of freedom and independence was in course of consummation." Morley, ib. p. 342.

to the successful termination of the negotiations said that the object of the agreements was "to give additional security to Belgium against the hazards of war waged upon her frontiers."[49] It is during that day, namely, the 10th of August, that some very animated debates took place on the subject in both Houses of Parliament, and particularly in the Lower House, when again Mr. Gladstone towered above the other commoners as an orator, dialectician and statesman.

In the Upper House, as some members of the opposition thought that the conclusion of the treaty of 1870 was uncalled for and unnecessary, and were expressing their surprise as to the absence from the latter instrument of the signatures of all the contracting parties of that of 1839, Lord Granville, answering both criticisms, observed that the conclusion of these compacts (namely, those of 1870) was necessary and that they did not in the slightest degree weaken the effect of the treaty of 1839; then referring to the abstention of the other Powers from acceding to the new instruments, he said, "there was a disinclination on the part of Russia to accede to this proposal; because Russia considers and says that the original treaty binds them and that they wish to have an understanding of a much wider description." Then, alluding to the construction given by the previous Government to the instrument of 1867 guaranteeing the neutrality of Luxemburg, he added, "we are not now in a position like that described by a conservative Government, when we joined in a treaty guaranteeing Luxemburg, and when, almost before the ink with which it was signed was dry, the Prime Minister and the Foreign Minister of this country announced, to the surprise of France and the indignation of Prussia, that we had signed it as a collective guarantee, and that as the co-operation of the other Powers was the only case in which the guarantee could possibly be brought into question, England had brought itself under no new obligation at all. I admit that there is this disadvantage about the present engagement, that if the contingency should arrive—which God forbid —we should be obliged to act upon our engagements."[50]

In the House of Commons the opposition again criticised the Government for concluding a new treaty, instead of adhering to that of 1839, and contended that the refusal of the other Powers, parties to the latter instrument, to accede to the new treaty of 1870, proved that the latter was not only unnecessary, but also that by its conclusion that of 1839 became null and void.

[49] Hansard, vol. 203, p. 1766.
[50] Hansard, ib. vol. 203, p. 1754 et seq.

Mr. Gladstone, as spokesman of the Cabinet, made that day a remarkable speech in which he scrutinized the question of the neutrality of Belgium and the treaty obligations of Great Britain connected with it. As it is from some expressions contained in that speech that the apologists of Germany draw their principal argument as to the alleged obsolescence of the treaty of 1839, it may be of interest to produce his utterances in extenso.

Mr. Gladstone, in answer to the reproach made to the Government for destroying the validity, as it was alleged, of the old treaty through the conclusion of the new one, said: "As far as I understood, my honorable and gallant friend * * * has complained that we have destroyed the treaty of 1839 by this instrument (the treaty of 1870) * * * I find that by one of the articles contained in it the treaty of 1839 is expressly recognized."

Later on in the course of the discussion, answering a similar criticism from the part of another member, he answered: "It is said that the treaty of 1839 would have sufficed, and we ought to have announced our determination to abide by it * * * In what then lies the difference between the two treaties? It is in this—that, in accordance with our obligations, we should have had to act under the treaty of 1839 without any stipulated assurance of being supported from any quarter whatever." What Mr. Gladstone meant here was the stipulation in the treaties of 1870 by which France and Prussia were under the obligation to side with Great Britain if either of them, then at war, should violate the neutrality of Belgium.

"The treaty of 1839," continued Mr. Gladstone, "loses nothing of its force even during the existence of this present treaty (that of 1870). The treaty of 1839 includes terms which are expressly included in the present instrument, lest by any chance it should be said that, in consequence of the existence of this instrument, it had been injured or impaired. That would have been a mere opinion, but it is an opinion which we thought fit to provide against, any combination, however formidable, whereas by the treaty now formally before Parliament we secure powerful support in the event of our having to act—a support with respect to which we may well say that it brings the object in view within the sphere of the practicable and attainable, instead of leaving it within the sphere of what might have been desirable, but which might have been most difficult, under all the circumstances, to have realized. The honorable member says that by entering into this engagement we have destroyed the treaty of 1839. But if he carefully considers the terms of this instrument he will see that there is nothing in them calculated to

bear out that statement. It is perfectly true that this is a cumulative treaty, added to the treaty of 1839."[51]

In the course of his speech Mr. Gladstone disapproved the apprehension of some members of the House that the absorption of Belgium by its powerful neighbors, namely France or Prussia, would be the death-knell of Great Britain. "My honorable and gallant friend," answered Mr. Gladstone, "says that if Belgium were in the hands of a hostile Power, the liberties of this country would not be worth twenty-four hours' purchase. I protest against that statement. * * * a statement more exaggerated I never heard fall from the lips of any member in this House."[52]

Then referring to the motives which actuated England to extend her protection to Belgium, Mr. Gladstone said: "What is our interest in maintaining the neutrality of Belgium? It is the same as that of every great Power in Europe. It is contrary to the interests of Europe that there should be unmeasured aggrandizement * * * What is the moral effect of those exaggerated statements of the separate interest of England? The immediate moral effect of them is this, that every effort we make on behalf of Belgium on other grounds than those of interest, as well as on grounds of interest, goes forth to the world as a separate and selfish scheme of ours; and that which we believe to be entitled to the dignity and credit of an effort on behalf of a general peace, stability, and interest of Europe actually contracts a taint of selfishness in the eyes of other nations because of the manner in which the subject of Belgian neutrality is too frequently treated in the House. If I may be allowed to speak of the motives which have actuated Her Majesty's Government in the matter, I would say that while we have recognized the interest of England, we never looked upon it as the sole motive, or even as the greatest of those considerations which have urged forward * * * But there is one other motive which I shall place at the head of all, that attaches peculiarly to the preservation of the independence of Belgium. What is that country? It is a country containing four or five millions of people, with much historic past, and imbued with a sentiment of nationality and a spirit of independence as warm and as genuine as that which beats in the hearts of the proudest and most powerful nations." The Prime Minister after bestowing further eulogy on the people of that country, said that its conquest by any other Power would be a violation of public law. "By the regulation of its internal concerns," continued Mr.

[51] Hansard, ib. vol. 203, p. 1789.

[52] It seems that this statement was first made by Napoleon I.

Gladstone, "amid the shocks of revolution, Belgium, through all the crises of the age, has set to Europe an example of a good and stable government gracefully associated with the widest possible extension of liberty of the people. Looking at a country such as that, is there any man who hears me who does not feel that if, in order to satisfy a greedy appetite for aggrandizement, coming whence it may, Belgium were absorbed, the day that witnessed that absorption would hear the death-knell of public right and public law of Europe." Then giving a wider scope to his thought, he continued: "But we have an interest in the independence of Belgium which is wider than that which we may have in the literal operation of the guarantee. It is found in the answer to the question, whether under the circumstances of the case, this country, endowed as it is with influence and power, would quietly stand by and witness the perpetration of the direst crime that ever stained the pages of history in the darkest ages, and thus become participators of the sin."

Mr. Gladstone then tried to impress upon the House his point of view that Great Britain was not, under all circumstances, bound to go to the length of resorting to forcible means for the defense of Belgium if her independence and neutrality was violated. "There is, I admit," he said, "the obligation of the treaty. It is not necessary, nor would time permit me, to enter into the complicated question of the nature of the obligations of that treaty; but I am not able to subscribe to the doctrine of those who have held in this House, what plainly amounts to an assertion that the simple fact of the existence of a guarantee is binding on every party to it irrespectively altogether of the particular position in which it may find itself at the time when the occasion for acting on the guarantee arises. The great authorities upon foreign policy to whom I have been accustomed to listen, such as Lord Aberdeen and Lord Palmerston, never to my knowledge took that rigid and, if I may venture to say so, that impracticable view of a guarantee. The circumstance that there is already an existing guarantee in force is of necessity an important fact, and a weighty element in the case, to which we are bound to give full and ample consideration."[53]

It is upon this last passage, already famous, of Mr. Gladstone's speech, that the apologists of Germany rely to justify the Kaiser

[53] Sir Henry Bulwer-Lytton, speaking that day in a humorous manner said, "I am glad, Sir, to see the right honorable gentlemen, the member for Buckinghamshire (Mr. Disraeli) in his place, for I think that opposition is the salt of politics, and that any speech of my right honorable friend at the head of the government (Mr. Gladstone) has always some flavor when seasoned by a speech from my right honorable friend opposite (Mr. Disraeli)." Hansard, vol. 203, p. 203 et seq.

for marching with his army across the Belgian territory against the consent of the government of the latter country, and of making Belgium one of the belligerents of this great war, with all the dire consequences to the brave people of this small but highly civilized state.

In their eagerness to prove the justice of their cause, these apologists overlook the fact that Mr. Gladstone was referring all the time, in his speech, to the duty incumbing upon Great Britain to defend Belgium and not to the right to attack her. What the then Prime Minister of England meant was that in cases of guarantee of the territory of a state it was questionable whether at a given moment the guarantor was bound at all costs to run to the assistance of the guaranteed state. In fact there may be moments when a state may not be in a position to assist a nation whose independence and territorial integrity she may have guaranteed by treaty. That undoubtedly was the paramount thought of Mr. Gladstone when he made the above assertion, which has been so erroneously construed by the friends of Germany; but, it should be admitted, not by the German government. The defenders of the German cause interpret that passage as meaning evidently not only that the German government was not bound to defend the neutral attitude of Belgium, but also to attack her and make that country the theatre of vast military operations. Such a construction attributed to the great British statesman is an insult to his memory and a travesty of truth.[54]

The guarantee of the neutrality of Belgium came up for discussion again incidentally when on April 12, 1872, the question of intervention in foreign countries was discussed in the House of Commons. As some members of the House had expressed their doubt as to the wisdom of Great Britain's entering into treaties of guarantee, Mr. Gladstone, who still was at the head of the Government, explained to the House the limit of the responsibility placed upon England from such obligations.

"My honorable friend (Sir Wilfred Lawson) appears to be of opinion," said Mr. Gladstone, "that every guarantee embodied in a treaty is in the nature of an absolute, unconditional engagement, binding this country under all circumstances, to go to war for the maintenance of the state of things guaranteed in the treaty, irrespective of the circumstances of the country itself, irrespective of the causes by which that war may have been brought about, irrespective of the conduct of the Power on whose behalf the guarantee

[54] That such was his view, is proved by a speech he made subsequently on treaty obligations, as we shall hereafter see.

may have been invoked and which may itself have been the cause of the war, and irrespective of those entire changes and circumstances and relations which the course of time frequently introduces, and which cannot be overlooked in the construction of these engagements. I have often heard Lord Palmerston give his opinion of guarantees both in this House and elsewhere, and it was a familiar phrase of his, which, I think, others must recollect as well as myself, that while a guarantee gave a right of interference it did not constitute of itself an obligation to interfere. Without adopting that principle as a rigid doctrine or theory applicable to this subject—on which it is very difficult, and perhaps, not very convenient to frame an absolute rule—yet I think there is very great force in Lord Palmerston's observation." Mr. Gladstone then referred to the treaties of 1870 for the guarantee of Belgian neutrality and explained the reasons which induced the government to conclude them. It might be interesting,—although, in some way, it is a repetition of his previous opinions,—to quote part of his speech dealing with the question. "In 1870," he said, "while we had a guarantee of a general character already upon record, we proceeded to make a most stringent guarantee for the defense of Belgium against the dangers into which it appeared to have been brought, not only by the war which had just then broken out, but likewise by certain circumstances anterior to that war. But why was it that this stringent guarantee of 1870 was entered into? It was not because of the guarantee contained in the treaty of 1839. That treaty would have stood where it was but for the new circumstances that occurred, and for the universal feeling and sentiment of the country with regard to those circumstances. It is not possible, I think, to contend from the nature of these general guarantees, that they are such as to exclude a just consideration of the circumstances of the time at which they may be supposed to be capable of being carried into effect. I believe that consideration of circumstances will always have a determining influence not only without derogation to good faith, but in perfect consistency with the principles of good faith, upon the practical course to be pursued."

Mr. Gladstone concluded his speech by making a statement as to what the British policy ought to be on exceptional occasions and laid down some principles of a general character which may not be amiss to quote as having a connection on the points then at issue. "We cannot," said the Prime Minister, "undertake to register a positive and absolute vow, by which we are to be restrained from recognizing any duty beyond our island barrier. The people of this

country would not consent to record such a vow, and I am bound to say that if they did, they would never keep it; for in great occasions, partly from considerations of danger, which, though remote, might become proximate, partly from considerations of honor, partly from sentiments of sympathy, partly from the sense of an interest, not narrow or selfish but wide and honorable, in the maintenance of general peace, they would think, without any disposition to a meddlesome policy, that there might be occasions when it would be their duty to look beyond what immediately and absolutely concerned themselves, to the general interest of the civilized world. To an abstract proposition of this kind we cannot be parties. The past errors of this country, moreover, have not lain on the side of refraining from war, but on the side of needlessly rushing into it. Cautions, therefore, we ought to accept; but though they are likely to be useful warnings against the indulgence of a besetting sin; we cannot agree entirely to foreswear brotherhood with other nations with respect to any dangers except those which menace an absolute invasion of our territory."[55]

That Mr. Gladstone was as scrupulous as the present British ministers in upholding the sanctity of treaties is proved also by his views expressed in the anonymous article he contributed to the Edinburg Review in January, 1871. Referring then to the projected violation of the neutrality of Luxemburg by Prussia: "With a great inconsistency," he wrote, "Count Bismarck is signing treaties with one hand, whilst he is tearing them with the other." Then speaking on the duty of a state to keep its treaty engagements, he said: "With the destruction of good faith and honor between man and man, between nation and nation, everything else that is worth living for comes in its turn to be destroyed. * * * Whatever else may betide, the policy of England stands firm on this immovable basis, that treaties, when made, must be respected. No Government which is to exist in this country can abandon those principles: no Government can flinch from the active defense of them. * * * Meanwhile it imposes on us the duty of cautiously abstaining from entering into any fresh engagement whatever with states devoid of political principles and the no less imperative duty of maintaining the positive engagements we have already contracted with the strength and energy of the Empire." That is exactly what Great Britain is now doing.[56]

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[55] Hansard, vol 210, p. 1176 et seq.

[56] The guiding doctrine of both political parties in England with respect to international obligations, has been in favor of their maintenance. Thus, the late Lord Salisbury, then Prime Minister, speaking at Albert Hall on May 6, 1899, and referring to treaty obligations, said, "But it is necessary in human affairs, to make engagements and con-

Most of the writers who have treated the Belgian question dwelt exclusively on the violation by Germany of the treaty of 1839,—to which Prussia was a contracting party—and touched only incidentally the very important point of the violation of the neutrality of Belgium, independently of that instrument. Assuming for the sake of argument that the treaty of 1839 is obsolete, and there was therefore no obligation imposed upon any Power to protect Belgium, does it then follow that any of the present belligerents had the right to send their troops across the Belgian territory in order to attack their enemy and generally to make that country the basis of their warlike operations? Many persons have overlooked the fact that independently of any treaty or guarantee, independently of the Hague Convention, Belgium, as a non-belligerent state, was entitled to all the rights enjoyed by every Power which does not participate in a war. Nor have these rights been created by the treaty of 1839 or by the Hague Convention on the rights of neutrals. The principle that the territory of a non-belligerent state should be respected by belligerents is very old and well known; and it is equally well known that unless such neutral state consents to grant free passage to the troops of either belligerent—in which case she might be considered as taking part in the war—none of them has the right to force a passage for her troops across such neutral territory.

It is claimed by the friends of Germany that had Belgium granted a free passage to the Kaiser's troops, she would have been treated in the same way as the Grand Duchy of Luxemburg and would have obtained compensation for any damages suffered by her people. Leaving aside all moral considerations and the self-respect that every

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tracts with your neighbor, and it is highly necessary when you have made them to keep them, otherwise when you propose to make them again nobody will trust you. * * * I do not of course mean to deal with international obligations in a pedantic spirit or to deny they are subject to modifications in consequence of the necessity of things which may not often happen in private affairs, but I maintain that the principle of acting upon treaties to which you have deliberately acceded is a sacred principle and one which lies at the base of the civilization of the world, and to maintain that because of the action—let it be as bad as you will—of one particular holder of power you have a right to scatter your obligation to the wind, is to undermine the security on which your international relations repose. Look in any quarter of the world you please—in Europe, in America, in China, nay, above all in Africa—it is upon the faith of treaties they rely." London Times, May 7, 1889.

Viscount James Bryce in seconding the motion of the address in reply to the King's speech in the House of Commons on November 11, 1914, said: "We are fighting against the doctrine that treaties may be broken whenever it pleases a strong Power to do so, and against the doctrine that whatever is necessary becomes thereby permissible. * * * This is a conflict of the principles of good faith and justice against the principles of violence and of force—and in a conflict of principles there can be no end until one or the other principle triumphs." London Times, November 12, 1914.

state ought to have, and looking into the question merely from the practical point of view; one might ask what guarantee was there for Belgium that her territory would not have been used as the theatre of the war operations? Was there any certainty that Germany would have had such a sweeping victory that Belgium would have escaped the horrors of war? The facts prove the very contrary because the Belgian territory would have been invaded also by the allies in order to chase the enemy. Is there any certainty that the territory of Luxemburg will escape destruction if the allies repulse the German Army and chase it across the territory of that country? The offer of compensation therefore in such a case cannot create a right, and all the arguments of the world cannot convince impartial observers that such offer made by the German Government to Belgium, could have justified the invasion of the Belgian territory by the Kaiser's troops with all the terrible consequences that followed.

But if Belgium was guilty of acts justifying the invasion of her territory, how can the Kaiser and his Ministers justify the invasion of the Grand Duchy of Luxemburg, whose government was not accused of any act justifying such an invasion, even according to the German Government's standard of justice? The verdict of the world, in both cases, will always be that Germany disregarded all treaty engagements and trampled under foot all the principles and usages of the law of nations, which have been so eloquently explained by her own brilliant writers. Suffice it to mention only the opinion of one of her most distinguished authors on International Law, who referring to the guarantee of the neutrality of Belgium, says, that "the States which have guaranteed the neutrality of Belgium and would not defend her against an aggressor, would not be considered as having kept their engagements and would be rendered guilty of a violation of law."[57]

In concluding this cursory review of the controverted questions of the violation of treaties and generally of the rights of neutral states, it may not be amiss to comment briefly on the theory propounded by a former Colonial Secretary of Germany, who, in his eagerness to defend the policy of his country, wrote that a state is not morally bound to respect her treaty obligation, "involving either a sacrifice of its own existence or an abdication of its sovereign function."[58]

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[57] Bluntschli, Le Droit International Codifié, art. 440.

[58] Dr. Bernhard Dernburg, North American Review, December, 1914. Also New York Sun, December 6, 1914.

In support of his view he quotes the above referred passage from Mr. Gladstone's speech, already famous, and a decision of the Supreme Court of the United States on a Chinese Exclusion case.[59]

That Mr. Gladstone's utterances have no bearing on the question at issue, has been already shown and it is needless to revert to them.

That the *dictum*—and such it was—of the Supreme Court had in view an entirely different question having no connection whatever with the abstract doctrine of Dr. Dernburg, will be seen from the extracts from the very decision quoted by him. But before doing that it might be necessary to explain shortly the principle of International Law governing this point, of which Dr. Dernburg gives us only a glimpse.

Leaving out of discussion the treaties called transitory or of disposition, such as those recognizing the independence of a state, the cession of territory, and the like compacts, which are of a permanent character and may only be altered by a new treaty, concluded either voluntarily or involuntarily, there remain two other kinds of instruments: namely, treaties proper, such as those of commerce and navigation and of similar character, which may have been concluded for a certain period or no time may have been fixed for their duration; and treaties concluded specifically for a contingency of war between the contracting or other parties. The latter comprise the Declaration of St. Petersburg, the Geneva and Hague Conventions, or at least the stipulations which would take effect in case of war, and other instruments of that character. Now treaties guaranteeing the neutrality of a state are concluded for the express contingency of war and may be, therefore, included in the last category. It might be useless to enter into the discussion of the question as to whether treaties proper may be denounced without the consent of both parties, because the instruments guaranteeing the neutrality of a state do not belong to that class. Suffice it only to say, that in principle, the great majority of writers admit that a change of circumstances not foreseen at the time of the conclusion of such a treaty, may, in certain cases, justify a nation to denounce such a contractual obligation, provided a suitable indemnification is offered to the other contracting party, in case such state suffers any injury. But in all these cases a previous examination of the facts and circumstances is essential, and it would be wrong to apply beforehand an abstract rule. Each case should be dealt with in accordance with the actual situation.[60]

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[59] Chae Chan Ping v. United States, 130 U. S. 581.

[60] See article by the present writer under the title "The Sanctity of Treaties," in Yale Law Journal, February, 1911, in which the views of the principal authorities on international law are given.

Now the treaty of 1839 was concluded, as above explained, for the express contingency of war. It had to take effect only in case of war between the present or other belligerents, endangering the independence and neutrality of Belgium. It would therefore be unreasonable, if not grotesque, to maintain that a compact of that nature, which has been solemnly entered into for that particular contingency, can be abrogated by one of the principal contracting parties. On the other hand it is a paradox to assert (as Dr. Dernburg does), that " by way of consolation she (Germany) was offered a scrap of paper and invited to accept the interpretation placed upon it by the Powers leagued against her," for the simple reason that no question of the construction of the clauses of that treaty arose between the contracting parties, except in the writings of the apologists of the Kaiser's Government. On the contrary, as above stated, up to the declaration of the present war, official Germany considered herself as being bound by the stipulations of the treaty of 1839.

Official declarations as to the validity of the treaty of 1839 from the part of Germany are not lacking. Thus, in the course of the sitting of the Budget Committee of the Reichstag on April 29, 1914, Herr von Jagow, Secretary of State for Foreign Affairs, said that the neutrality of Belgium was determined by international conventions and that Germany was resolved to respect these conventions.[61]

This was affirmed by Herr von Heeringen, Minister of War, when he also declared in the Reichstag that Germany would not lose sight of the fact that Belgian neutrality was guaranteed by international treaties.[61]

It may also be pertinent to mention the fact that Germany, or rather Prussia on behalf of the other German states, was party to the Conference of London of 1871,—which was held on account of the abrogation by the Czar of Russia of certain clauses of the Treaty of Paris of 1856,—when the rule was laid down in a Declaration that "it is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Powers by means of an amicable arrangement."[62]

Now coming to the opinion of the Supreme Court of the United States in the Chinese Exclusion case, above referred to, which is used by Dr. Dernburg as supporting his own theory of the right of states to abrogate *ex parte* their treaties, and particularly that of

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[61] Gray Paper of Belgium, inclosure in no. 12.

[62] Herstlet, Map of Europe by Treaty, vol. III, p. 433.

1839, let us see what were the facts in that case, and what the highest court of the land decided.

In 1887 a subject of China, residing up to that time at San Francisco, went back to his country with the intention of returning to the United States, having been furnished with the required certificate by the authorities. During his absence Congress passed an Act by which subjects of the Celestial Empire, who returned to China, could not be allowed to land in this country. The provisions of that Act were evidently contrary to the stipulations of previous treaties concluded between the United States and China. Consequently there was a conflict between a treaty and an Act of Congress, which was not without precedent. The question to be decided by the Supreme Court was which of these two expressions of the Legislature —since treaties are concluded with "the advice and consent" of the Senate—shall be binding upon the country. The court had to deal with a particular question submitted to its decision, nor was it for the first time that it had to pass upon two conflicting acts of another department of the Government. On previous occasions it had already decided that an Act of Congress passed subsequent to a treaty should prevail, because that was the last expression of the sovereign will, and that it was not for the judicial but for the other departments of the Government to be concerned with the consequences resulting from the abrogation of a treaty. Such was also the ruling in this particular case[63] from which the official apologist of Germany quotes a *dictum* in support of his theory.

Mr. Justice Field, in delivering the opinion of the Court in that case said, among other things, that the validity of the Act (excluding Chinese from the United States, even if they were former residents) was assailed as being in effect an expulsion from the country of Chinese laborers, in violation of existing treaties between the United States and the Government of China, and of rights vested in them under the laws of Congress. "It must be conceded," said the court, "that the Act of 1886 is in contravention of express stipulations of the treaty of 1868 and of the supplementary treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement. The treaties were of no greater value than the Act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority given to the one over the other. A treaty, it is true, is in its

[63] Chae Chan Ping v. United States, 130 U. S. 581.

nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."

The passage upon which Dr. Dernburg relies, and alleges that it strengthens his theory of the right of his country to disregard the treaty of 1839, is as follows: "It will not be presumed that the legislative department of the Government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the Government in disregarding their stipulations, but demand in the interest of the country that it should do so, there can be no question. Unexpected events may call for a change in the policy of the country." But the court did not stop there but indicated the course which may be taken by the other contracting party, as follows:

"Neglect or violation of stipulations on the part of the other contracting party may require corresponding action on our part. When a reciprocal engagement is not carried out by one of the contracting parties, the other may also decline to keep the corresponding engagement. * * * And further, the question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts."

After endorsing the opinion of Mr. Justice Curtis that the power to refuse the execution of a treaty was a prerogative "which no nation could be deprived of without affecting its independence,"[64] the court added, that "if the power mentioned is vested in Congress, any reflection upon its motives, or the motives of any of its members in exercising it, would be entirely uncalled for. The Court is not a censor of the morals of other departments of the Government; it is not invested with any authority to pass judgment upon the motives of their conduct." Then coming to the point at issue, the court said, "That the Government of the United States, through the action of the legislative department, can exclude aliens from its territory, is a proposition which we do not think open to controversy. Jurisdiction over its own territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part

[64] Taylor v. Morton, 2 Curtis 454-459.

of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. * * * If * * * the government of the United States, through its legislative departments, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subject. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects, is dissatisfied with the action, it can make complaint to the executive head of our Government, or resort to any other measure which, in its judgment, its interest or dignity may demand, and there lies its only remedy. * * * But far different is this case, where a continued suspension of the exercise of a governmental power is insisted upon as a right, because, by the favor and consent of the Government, it has not heretofore been exerted with respect to the appellant or to the class to which he belongs. Between property rights not affected by the termination or abrogation of a treaty, and expectations of benefits from the continuance of existing legislation, there is as wide a difference as between realization and hope."

It is clear from the above extracts that the Supreme Court of the United States adjudged a question affecting the laws and Constitution of the United States and was not concerned with the consequences of the action of the Executive or of the Legislative Department of the Government. It was passing upon a legal question, on a matter of internal policy, and was not considering, and could not consider, how and in what manner the Government would justify itself towards a foreign Power whose treaty was abrogated by an Act of Congress. The Court had to deal with a concrete question, and was not propounding an abstract doctrine. It had to decide, as on former occasions, whether an Act of Congress would prevail over a previously concluded treaty. From an abstract dictum of a Court to conclude that a state may throw to the winds any treaty, particularly an instrument which has been concluded for the very contingency which arose at the time of its violation, is a thesis which cannot possibly meet with the approval of public opinion in this or any other neutral country.

But all the justifications and excuses for the violation of a solemn treaty and the trampling underfoot of the general principles and usages of the law of nations in regard to non-belligerent states—be they official or semi-official, are mere verbiage—the bare truth being the eagerness of Germany to invade France through the easiest way and with the least possible injury and danger to her army. The memorable interview of the British Ambassador at Berlin, both with the Imperial Chancellor and with the Secretary of State for Foreign Affairs, gives the clue to the situation. When Sir E. Goschen asked Herr von Jagow "whether the Imperial Government would refrain from violating Belgian neutrality," the latter replied, "that he was sorry to say that his answer must be No." * * * The reasons given for the violation of Belgian neutrality, were in the words of the German Secretary of State, "that they had to advance into France by the quickest and easiest way, so as to get well ahead with their operations and endeavor to strike some decisive blow as early as possible. That it was a matter of life and death for them, as if they had gone by the more southern route they could not have hoped, in view of the paucity of roads and strength of the fortresses, to have got through without formidable opposition entailing great loss of time; that this loss of time would have meant time gained by the Russians for bringing up their troops to the German frontier." And that in fine, "rapidity of action was the great German asset, while that of Russia was an inexhaustible supply of troops."[65]

There can certainly not be plainer language than this. When one connects it with the statement of the Imperial Chancellor, Bethmann Von Hollweg, in the Reichstag on Aug. 4, when he pronounced the memorable words that Germany was in a state of necessity and that necessity knew no law, and made the admission that the violation of the neutrality of Belgium was contrary to the dictates of international law, we need not go any further in order to discover the real motives of the unlawful action of the German government.[66]

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[65] Great Britain White Paper no. 160.

[66] Frederick the Great, the ancestor of the present Kaiser of Germany does not seem to have had much faith in treaties of guarantee. "All the guarantees," he wrote at one time, "are like the work of a filigree more apt to please the eyes than of any utility. (Quoted by Geffcken in Holtzendorf's Handbuch des Völkerrecht, vol. III, p. 107. See Frederick, Historie de mon Temps I ch. IX quoted by P. Fodéré, op. cit. II no. 1014. Also by A. Rivier op. cit. II p. 103.

Nor, it seems, did Prince Bismarck think otherwise. Lord Morley, the biographer of Mr. Gladstone, tells us that in 1865 the Dutch Minister in Vienna told the British Ambassador in that city, that in a conversation he (the Dutch Minister) had with Prince Bismarck (then Count Bismarck) the latter had given him to understand that without colonies Prussia could never become a great maritime nation, that he (Bis-

The facts speak for themselves.

Such in short are the historical facts and the controverted points connected with the neutrality of the Grand Duchy of Luxemburg and the Kingdom of Belgium. These states were placed under the *aegis,* so to say, of some of the leading Powers of Europe, their territory and independence were pledged as being beyond the sphere of war operations. Besides, these permanently neutralized small states, as members of the family of nations of the civilized world, were entitled to enjoy all the rights and privileges recognized for centuries for non-belligerent nations. But not only were these international usages considered as non-existent by Germany, but also rights which had been safeguarded by international compacts of a most solemn character; to violate them is, to use the words of a former Colonial Secretary of Germany,[67] "a wanton disregard of plighted faith justifying the expulsion of even the greatest Power from the community of civilization."

Both Luxemburg and Belgium are now under the heel of the conqueror, the one being too weak to defend itself, submitting reluctantly to the will of the invaders; the other, having attempted to resist, is reduced to misery and ruin.

We seem to be yet far from the day when brutal force shall be subservient to moral power and righteousness, and when the rules governing international relations shall be regulated by high principles of morality. For the moment, one is unfortunately bound to admit the "bankruptcy of International law," and to confess that what was said over two thousand years ago by a Greek historian, that "there is no right stronger than the arms," and that "whoever is strong, is considered as always speaking right and acting right,"[68] is still the dominant feature of the century in international relations.

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marck) had coveted Holland less for her own sake, than for her colonies, and that when he (Bismarck) was reminded that Belgium was guaranteed by the European Powers, Bismarck replied that "a guarantee was in these days of little value." John Morley, Life of Wm. E. Gladstone, vol. II. p. 320.

The late F. Crispi, Premier of Italy, told of an interview he had with Prince Bismarck in the course of one of his visits to Berlin; the German Chancellor referring to Belgium, said, "Belgium cannot but render us one service, whether she wishes it or not; that is to permit the passage through her territory of a German army. * * * If she has to undergo a territorial change, she will submit to it in agreement with us, under certain determined conditions which will only depend upon us." Quoted by Mme. Juliette Adam in Nouvelle Revue of October 1, 1888, reproduced in same of December 1, 1914.

[67] Dr. Bernhard Dernburg, in New York Sun, December 6, 1914.

[68] Thucydides.

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